

Nova Law Review

Volume 13, Issue 3

1999

Article 10

Annual Survey of Florida Law - Legal Ethics

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Abstract

During the survey period The Florida Bar saw some things remain the same in legal ethics and discipline: many, many lawyers neglected their clients, misappropriated their clients' funds or otherwise abused their clients, and a number of lawyers had sanctions imposed on them personally outside of discipline proceedings for persisting in frivolous litigation or handling litigation in a dilatory manner.

Annual Survey of Florida Law — Legal Ethics

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During the survey period The Florida Bar saw some things remain the same in legal ethics and discipline: many, many lawyers neglected their clients, misappropriated their clients' funds or otherwise abused their clients, and a number of lawyers had sanctions imposed on them personally outside of discipline proceedings for persisting in frivolous litigation or handling litigation in a dilatory manner. At the same time, a trend seemed to be developing in that substance abuse became more frequently acknowledged or claimed as the cause of other misconduct. Florida Lawyers Assistance, Inc., which was created in 1986 to assist lawyers to rehabilitate themselves from drug or alcohol addiction,¹ kept busy.² Drug-related crimes were the basis for a number of disbarments.

Some changes also were in the works: Florida Bar committees struggled mightily with the issues of advertising and solicitation abuses and a lawyer's duty when his client insists on giving perjured testimony, but found these matters to be not easily resolved. The Bar's Professional Ethics Committee issued eleven opinions on a variety of subjects, and the bar's ethics attorneys issued thousands of oral and written opinions.³ Amendments⁴ to the Rules of Professional Conduct

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1. The Board of Governors of The Florida Bar established Florida Lawyers Assistance as a separate, nonprofit corporation whose board of directors is appointed by the Board of Governors. The Board of Governors approved the corporation's articles of incorporation and bylaws January 9, 1986. The Florida Bar News, Feb. 1, 1986, at 1.

2. In its brief existence Florida Lawyers Assistance has accumulated close to 400 cases through mandatory discipline-related referrals and self-referrals. Florida Lawyers Assistance Hotline Newsletter, Dec. 12, 1988. With regard to mandatory referrals, see the cases discussed *infra* under the heading "Substance Abuse." For self-referrals, the corporation regularly publishes a toll-free number in the Florida Bar News. Rule of Discipline 3-7.1(h), entitled "confidentiality regarding treatment for alcohol abuse," ensures that voluntary consultations with Florida Lawyers Assistance will not come to light in disciplinary proceedings except by the lawyer's own choice.

3. The committee's opinions are published in the Florida Bar News when issued and are compiled in THE FLORIDA BAR, PROFESSIONAL ETHICS OF THE FLORIDA BAR

designed to exert some control over "brokering" of personal injury cases took effect January 1, 1988. An amendment to the Rules of Discipline, effective on the same date, requires a lawyer to inform his law firm when a disciplinary complaint is filed against him.⁵ Most discipline proceedings still applied the Code of Professional Responsibility, which governed the conduct of Florida lawyers until 1987, but citations to the Rules of Professional Conduct⁶ and the Florida Standards for Imposing Lawyer Sanctions began to appear.⁷

(2d ed. 1987), a loose-leaf manual published by The Florida Bar and supplemented annually. Staff opinions are not published, but are available at law school libraries.

4. Florida Bar re Amendments to the Rules Regulating the Fla. Bar, 519 So. 2d 971 (Fla. 1987). As discussed *infra*, the brokering amendments consist of a new rule FLORIDA'S RULES OF PROFESSIONAL CONDUCT Rule 4-7.3 ("legal services information") and a new subparagraph (d) under Rule 4-1.5(F)(4) (contingent fees in personal injury cases).

5. FLORIDA'S RULES OF PROFESSIONAL CONDUCT Rule 3-7.1(d). The provision specifies the form in which the disclosure is to be made, requiring that it be made within fifteen days after the lawyer receives notice that a complaint has been filed, and the provision requires that a copy of the disclosure be served on The Florida Bar.

6. E.g., Florida Bar v. Griggs, 522 So. 2d 24 (Fla. 1988) (rules 4-1.3, 4-1.4(a), 4-3.2, 4-8.4(c), (d)); Florida Bar v. Titone, 522 So. 2d 822 (Fla. 1988) (rules 4-1.1, 4-1.3, 4-1.4(a)(b), 4-1.16(d), 4-3.4(c), 4-8.1(a), 4-8.4(c); Florida Bar v. Sheppard, 529 So. 2d 1101 (Fla. 1988) (rules 4-5.3(b), 4-7.5(a)); Florida Bar v. Greene, 529 So. 2d 1103 (Fla. 1988) (rule 4-1.3); Florida Bar v. Story, 529 So. 2d 1114 (Fla. 1988) (rules 4-1.1, 4-8.4(b), (c), (d)); Florida Bar v. Walker, 530 So. 2d 305 (Fla. 1988) (rules 4-1.3, 4-1.4(a), 4-1.5 (a), 4-1.16(d), 4-3.2, 4-8.4(b), (c), (d); Florida Bar v. Golden, 530 So. 2d 931 (Fla. 1988) (rule 4-1.3). See Brent v. Smathers, 529 So. 2d 1267 (Fla. 3d Dist. Ct. App. 1988) (applying rule 4-1.7 upon a motion to disqualify counsel). FLORIDA'S RULES OF PROFESSIONAL CONDUCT comprise chapter 4 of the RULES REGULATING THE FLORIDA BAR.

7. E.g., Florida Bar v. Newhouse, 520 So. 2d 25 (Fla. 1988); Florida Bar v. Seldin, 526 So. 2d 41 (Fla. 1988); Florida Bar v. Weissner, 526 So. 2d 63 (Fla. 1988); Florida Bar v. Ribowsky-Cruz, 529 So. 2d 1100 (Fla. 1988). FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS, which were approved by the Board of Governors in November 1986 (The Florida Bar News, Dec. 15, 1986, at 4), are based on the ABA Standards for Imposing Lawyer Sanctions. The Florida standards, published in the 62 FLA. B.J., 118-22 (Sept. 1988) provide guidelines for use in grievance proceedings for rating the severity of the misconduct and the appropriate discipline therefor. Mitigating and aggravating factors are listed along with factors that should not be considered either aggravating or mitigating. Ideally, increased reliance on the standards will produce a uniformity and predictability of discipline for like acts of misconduct of like levels of egregiousness that is not readily apparent in discipline orders to date. Part of the problem has been that the Florida Supreme Court has not often used its discipline orders as teaching tools, explaining why the court chose a particular level of discipline and, when applicable, why the discipline varies from that imposed in other substantive

This article attempts to summarize these recent activities and developments in ethics and discipline law in Florida. Discipline cases that are discussed will be by way of example.

Brokering and Advertising

The amendments to the Rules of Professional Conduct that took effect in 1988 included a new rule, 4-7.3, which requires, among other things, that "[e]ach lawyer or law firm that advertises his, her or its availability to provide legal services shall have available in written form for delivery to any potential client . . . [a] factual statement detailing the background, training or experience of each lawyer or law firm."⁸ In addition, every advertisement in any and all media must contain a notice that such written information is available at no cost upon request.⁹ One provision of the rule,¹⁰ which calls for the notice to be printed at the top of each page of a telephone directory containing display advertisements of lawyers, has proved to be unworkable and is likely to be modified some time in 1989 or 1990 when other changes are made in the rules governing advertising and solicitation.¹¹

A provision added to the fee rule, 4-1.5, provides that a lawyer who refers a personal injury case to another lawyer to handle may receive no more than twenty-five percent of the fee. Any greater amount is presumed to be clearly excessive. Lawyers or law firms that truly are co-counsel, having substantially equal active participation, can obtain court authorization for a different fee division.¹²

The United States Supreme Court derailed, at least temporarily, The Florida Bar's drive to impose new restrictions on direct mail advertising. The bar withdrew a petition¹³ pending before the Florida Su-

tially similar cases.

8. FLORIDA'S RULES OF PROFESSIONAL CONDUCT Rule 4-7.3(a).

9. *Id.* Rule 4-7.3(d).

10. *Id.* Rule 4-7.3(d)(2).

11. The Florida Bar's Commission on Advertising and Solicitation has been considering an amendment that would require that the notice be included in all display advertisements in telephone directories. The author provides staff assistance to the commission, which is expected to submit its report and proposals to the Board of Governors by May 1989.

12. FLORIDA'S RULES OF PROFESSIONAL CONDUCT Rule 4-1.5(F)(4)(d).

13. The official notice containing the text of the rule changes was published in The Florida Bar News, May 15, 1988, at 12. Oral argument had been set for June 22, 1988, but was canceled after *Shapiro v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988) was handed down.

preme Court after the nation's high court decided *Shapero v. Kentucky Bar Association*.¹⁴ *Shapero* held that a state bar cannot ban non-deceptive targeted mail solicitation (e.g., a letter mailed to an accident victim offering representation in a personal injury suit) without first demonstrating that less restrictive regulation was tried and proved inadequate to serve the state's legitimate interests.

The Florida Supreme Court has permitted targeted mail solicitation since January 1, 1987. The bar's petition sought to reinstate the ban only for the personal injury/wrongful death field and, among other things, provide for forfeiture of fees earned in cases that were obtained in violation of the ethics rules governing advertising and solicitation.¹⁵ It was apparent from *Shapero* that some of the proposed rule amendments, which were approved by the bar's Board of Governors in January 1988, would be vulnerable to a first amendment challenge.

A Special Commission on Advertising and Solicitation has been reviewing the advertising and solicitation rules governing advertisements of any kind with an eye toward developing a package of amendments to curb perceived abuses, particularly in mail solicitation, television advertising, and yellow pages advertising.

Public discipline of a lawyer who violates the advertising and solicitation rules is a rarity in Florida, as a review of discipline cases in the Southern Reporter over the last five or ten years will reveal. Only one lawyer received public discipline during the survey period for improper advertising.¹⁶ That lawyer received a public reprimand and three years probation and was required to take and pass the ethics portion of the bar exam. The lawyer's misconduct included an ad which offered a "holiday special" on two gifts, each priced at "\$150 bucks": a divorce for a spouse or an adoption for a stepchild. The divorce offer was featured prominently and that aspect of the ad was deemed to appeal to the reader's desire for revenge or spite.¹⁷ During the survey period another lawyer, Forrest Johnson, was charged by the Gainesville state attorney with violating the felony statute prohibiting solicitation of motor

14. 108 S. Ct. 1916 (1988).

15. See *supra* note 13. The Fort Myers police chief tried, but failed, to prevent lawyers engaged in direct mail solicitation of personal injury cases from obtaining copies of motor vehicle accident reports. *Spurlin v. Scheiner*, 531 So. 2d 988 (Fla. 2d Dist. Ct. App. 1988).

16. *Florida Bar v. Pascoe*, 526 So. 2d 912 (Fla. 1988).

17. The exact language was: "Get that spouse of yours some'in' he or she's been wantin' for a long time. A divorce"

vehicle accident cases.¹⁸ Ultimately Johnson entered a nolo contendere plea to misdemeanor solicitation,¹⁹ and adjudication was withheld.

The advertising and solicitation rules include provisions regulating a law firm's name. A very basic rule of long standing, and of which many lawyers appear to be ignorant, is the rule against practicing under a name that implies the existence of a partnership when none exists.²⁰ In *Florida Bar v. Hastings*,²¹ a lawyer was given a public reprimand for practicing under the name Hastings and Goldman when the lawyer was merely an associate of Goldman. In *Florida Bar v. Shepard*,²² a lawyer who took over cases from a deceased attorney with whom he had never been associated received a public reprimand based in part on his use of the deceased lawyer's letterhead with his own name added by typewriter to the letterhead. He was found to have violated the former and current rules against practicing under a misleading firm name.

The Professional Ethics Committee issued three opinions in 1988 that relate to lawyer advertising and solicitation. The first, Opinion 88-2,²³ declared it permissible for a lawyer to use the term "Juris Doctor" on his or her letterhead and business cards, but suggested that in advertisements use of the term could be misleading in some circumstances. The second opinion, 88-9,²⁴ stated that in advertisements and announcements, a lawyer may truthfully indicate a specialty by using terms such as "practice limited to" and "concentrating in," but, as provided in Rule 4-7.5, may not use derivatives of the term "specialize." The opinion also stated that lawyers may list former legal and nonlegal

18. FLA. STAT. §§ 817.234(8)-(9). Reported in various newspapers on October 3, 1987, including The Tampa Tribune, Oct. 3, 1987, at 1B and The Miami Herald, Oct. 3, 1987, at 9A.

19. Reported in The Gainesville Sun, July 26, 1988, at 36, col. 5.

20. FLORIDA'S RULES OF PROFESSIONAL CONDUCT Rule 4-7.6(d). The balance of the rule regulates other aspects of law firm names and letterhead. FLORIDA'S CODE OF PROFESSIONAL RESPONSIBILITY contained substantially the same provisions. Over the years the Professional Ethics Committee has issued numerous opinions regarding law firm names. See, e.g., Op. 64-20 (use of deceased lawyer's name), Op. 65-55 (use of deceased lawyer's name), Op. 71-49 (continued use of partner's name after he withdraws from firm), Op. 72-39 (use of deceased lawyer's name), Op. 74-20 (including name of associate or non-shareholder in firm name). Opinions compiled in THE FLORIDA BAR, PROFESSIONAL ETHICS OF THE FLORIDA BAR (2d ed. 1987).

21. 523 So. 2d 571 (Fla. 1988).

22. 529 So. 2d 1101 (Fla. 1988).

23. Full text published in The Florida Bar News, Jan. 15, 1988, at 18.

24. Full text published in The Florida Bar News, Apr. 15, 1988, at 15.

positions and nonlegal degrees in their advertisements and announcements. The third opinion, 88-13,²⁵ found several ethical objections to a proposal of two law partners to form a corporation that would have a law-related name such as "Legal Hotline, Inc." and multiple offices staffed by nonlawyers at locations such as shopping centers and flea markets. A person encouraged by the corporation's name to stop in with a legal question would not be given advice or assistance, but rather would be given an appointment with one of the law partners.

The committee identified three problems: First, a name such as Legal Hotline, Inc. would be misleading because it implies that the corporation would provide legal information, when in fact it would provide only referrals. Second, a business corporation cannot practice law, so an attorney could not provide advice through the corporation. Third, the proposed corporation seems to be in essence a very limited lawyer referral service; that being the case, the law partners could not ethically accept referrals from it unless it conformed with rule 4-7.7.²⁶

Conflict of Interests

Rule 4-1.9,²⁷ which governs conflicts of interests involving former clients, was properly applied by the Third District Court of Appeal in *Brent v. Smathers*,²⁸ one of the few Florida appellate cases applying the Rules of Professional Conduct.²⁹ In *Brent* the court disqualified a

25. Full text published in *The Florida Bar News*, Aug. 1, 1988, at 11.

26. The rule sets forth requirements that a lawyer referral service must meet in order for a member of The Florida Bar to accept referrals from it. Until this rule was approved by the Florida Supreme Court, lawyers were prohibited from accepting referrals from privately operated, for-profit referral services. FLORIDA'S CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(C), (D).

27. "A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
- (b) Use information relating to the representation to the disadvantage of the former client except as rule 4-1.6 would permit with respect to a client or when the information has become generally known.

FLORIDA'S RULES OF PROFESSIONAL CONDUCT Rule 4-1.9.

28. 529 So. 2d 1267 (Fla. 3d Dist. Ct. App. 1988).

29. The Fifth District Court of Appeal correctly applied the general imputed disqualification rule, FLORIDA'S RULES OF PROFESSIONAL CONDUCT Rule 4-1.10, in *Edward J. DeBartolo Corp. v. Petrin*, 516 So. 2d 6 (Fla. 5th Dist. Ct. App. 1987).

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law firm from continued representation of the defendant.

The law firm had been representing two individuals in their capacity as co-personal representatives of an estate and co-trustees of a trust. One of the co-personal representatives/co-trustees (plaintiff trustee) was also a beneficiary of the trust. The other (defendant trustee) was a partner in the law firm. When plaintiff trustee sued defendant trustee and the other trust beneficiaries, alleging that a breach of fiduciary duty on the part of defendant trustee had resulted in an increase in distributions to the other beneficiaries and a decrease in distributions to her, the law firm initially undertook to represent defendant trustee and the other beneficiaries in the litigation. The law firm then withdrew from representing the beneficiaries, as it unquestionably was obligated to do, but contended that the conflict rules did not preclude the firm from representing defendant trustee against plaintiff trustee.

The court rejected the law firm's arguments and disqualified it from representing defendant trustee. Tracking rule 4-1.9, the court found that the litigation was the same or a substantially related matter in which the firm had jointly represented plaintiff and defendant trustees and that the interests of plaintiff trustee clearly were materially adverse to the interests of defendant trustee. The absence of confidential information to protect as between the co-trustees was not dispositive, the court pointed out, because rule 4-1.9 also imposes upon a lawyer a duty of loyalty:

Commonly understood concepts of loyalty would seem at odds with permitting a law firm which previously represented one co-trustee, to defend the other co-trustee and beneficiaries in an action premised on a breach of confidence, and in the course of that defense to show that the complainant co-trustee acquiesced in the acts she now claims constituted the breach.³⁰

The Second District Court of Appeal no doubt would have reached the same conclusion in *Brent v. Smathers* as the Third District Court of Appeal did; however, its approach to disqualifications not based on attorney conflicts, but rather based on conflicts created by their staff, differs from that of the Third District Court of Appeal.

In an opinion that does not cite any conflict rule, the Second District Court of Appeal affirmed a trial court's refusal to disqualify the plaintiff's lawyer because he hired, shortly before trial was to begin, a

30. *Brent*, 529 So. 2d at 1269.

legal secretary who had been working on the case file at the defendant's lawyer's firm.³¹ The defendant (Esquire), relying on a Third District Court of Appeal decision,³² argued that the plaintiff's firm must be disqualified because the secretary had been privy to all confidential information contained in the defense firm's title. The Second District Court of Appeal agreed with the Third District Court of Appeal that disqualification should not be rejected because the person in possession of confidential information was a nonlawyer rather than a lawyer, but the court did not agree that disqualification of the firm should be automatic, as it no doubt would be if the person were a lawyer.

The court ruled:

Before such drastic action is considered the trial court should conduct an evidentiary hearing, the purpose of which is to determine, not just whether a potential ethical violation has occurred, but whether as a result one party has obtained an unfair advantage over the other which can only be alleviated by removal of the attorney. . . .³³

In this case, the trial court did conduct such a hearing, receiving testimony and evidence that the secretary never revealed confidential information, had been specifically instructed by plaintiff's attorney not to do so, and had been given only "relatively insignificant" duties associated with the case.

An inexperienced lawyer who represented the husband in an uncontested dissolution of marriage and advised the unrepresented wife on child custody without informing her that he was not representing her interests was found to have engaged in conduct prejudicial to the administration of justice.³⁴ He was placed on two years probation with the conditions that for six months his dissolution cases would be reviewed by another practitioner and that he enroll in family law courses and seminars.

A lawyer who gave legal advice to people who contracted for the services of his son's real estate and property management agency without revealing his conflict and making it clear that he was acting on

31. *Esquire Care, Inc. v. Maguire*, 532 So. 2d 740 (Fla. 2d Dist. Ct. App. 1988).

32. *Lackow v. Walter E. Heller & Co. S.E., Inc.*, 466 So. 2d 1120 (Fla. 3d Dist. Ct. App. 1985).

33. *Maquire*, 532 So. 2d at 741.

34. *Florida Bar v. Kauffman*, 517 So. 2d 18 (Fla. 1987).

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behalf of the real estate agency only was suspended for thirty days.³⁵ A lawyer who sold shares in a corporation to a client without making appropriate disclosures of the conflicting interests of attorney and client was given a public reprimand. He also was required to refund the client's money with interest within one year.³⁶

Negligence, Neglect and Abandonment

Judging from the number of lawyers disciplined for their misconduct during the survey period, neglect or abandonment of clients runs rampant in Florida.

A lawyer whose neglect of a chapter 11 debtor caused a dismissal of the bankruptcy action and whose trust account check bounced after successor counsel obtained an order setting aside the dismissal and directing the lawyer to turn over the debtor's funds was disbarred.³⁷ Disbarment likewise was imposed on a lawyer who misrepresented to a client that he had filed the client's tax return, failed to represent a defendant client in a civil action or to cooperate with successor counsel, failed to pay his bar dues for two years, and failed to respond to the disciplinary proceeding.³⁸

A lawyer who neglected his clients' defense of a civil action, causing a judgment of more than \$30,000 to be entered against them, and then refused to handle their appeal unless they paid a fee for the appellate work was suspended for six months.³⁹ The court rejected the referee's recommendation of a public reprimand because the lawyer's acts were not the result of negligence, but were intentional and the consequences were predictable: "It is unconscionable for an attorney to insist on payment of a fee to extricate a client from the adverse position which the attorney's acts caused in the first instance," the court held.⁴⁰ The court cited Standard for Imposing Lawyer Sanctions 4.41(a) as providing that suspension is appropriate when a lawyer knowingly fails to perform services for a client and thereby causes injury or potential

35. Florida Bar v. Lage, 529 So. 2d 1099 (Fla. 1988).

36. Florida Bar v. Belleville, 429 So. 2d 1109 (Fla. 1988). See Boutwell v. State, 530 So. 2d 1092 (Fla. 1st Dist. Ct. App. 1988) for an analysis of a criminal defense attorney's conflict problem when a potential adverse witness is represented by the attorney in an unrelated criminal matter.

37. Florida Bar v. Weiss, 516 So. 2d 947 (Fla. 1987).

38. Florida Bar v. Maichack, 516 So. 2d 259 (Fla. 1987).

39. Florida Bar v. Weisser, 526 So. 2d 63 (Fla. 1988).

40. *Id.* at 65.

injury to the client.

Another lawyer whose neglect caused a real estate deal to fall through, who demanded an additional fee to finish the work he had failed to complete within the time frame specified by the client, and who failed to keep appointments or communicate with clients was suspended for thirty days.⁴¹ The suspension was to run concurrently with another suspension that was already in effect.

A lawyer who neglected her clients' cases, misrepresented to them the status of their cases, made misrepresentations in an effort to disqualify a judge, and practiced law during a suspension was suspended for ninety days, required to undergo psychological counseling, placed on a year probation, and required to take and pass the ethics part of the bar examination.⁴² Another lawyer who neglected cases and lied to clients about their status was given a forty-five day suspension and two years probation, with a requirement that he submit verified caseload reports quarterly.⁴³

Several lawyers who abandoned their law practices and their clients without notice, often without refunding unearned fees and often with harm done to the clients, were disbarred.⁴⁴ In one such case,⁴⁵ the lawyer claimed that the reason he abandoned his law practice was cocaine abuse. The bar countered with evidence that the lawyer had gone into hiding because he had been involved in the sale of arms to Nicaragua and one of his associates had recently been killed.

41. *Florida Bar v. Sapp*, 526 So. 2d 908 (Fla. 1988).

42. *Florida Bar v. Milin*, 517 So. 2d 20 (Fla. 1987).

43. *Florida Bar v. Griggs*, 522 So. 2d 24 (1988). A one year suspension with requirements for restitution and taking and passing the entire Florida bar exam was imposed in *Florida Bar v. Patterson*, 529 So. 2d 285 (Fla. 1988), and a one year suspension with two years probation was imposed in *Florida Bar v. Thompson*, 530 So. 2d 285 (Fla. 1988). A ten day suspension with a year probation and supervision was imposed in *Florida Bar v. Golden*, 502 So. 2d 891 (Fla. 1987). A public reprimand was imposed in the following cases: *Florida Bar v. Hall*, 521 So. 2d 1117 (Fla. 1988); *Florida Bar v. Lowery*, 522 So. 2d 27 (Fla. 1988); *Florida Bar v. Jordan*, 523 So. 2d 570 (Fla. 1988); *Florida Bar v. Knowlton*, 527 So. 2d 1378 (Fla. 1988); *Florida Bar v. Greene*, 529 So. 2d 1103 (Fla. 1988).

44. *Florida Bar v. Ribowsky-Cruz*, 529 So. 2d 1100 (Fla. 1988); *Florida Bar v. Setien*, 530 So. 2d 298 (Fla. 1988); *Florida Bar v. Walker*, 530 So. 2d 305 (Fla. 1988). Compare *Florida Bar v. Fitos*, 522 So. 2d 369 (Fla. 1988) (one year suspension).

45. *Florida Bar v. Setien*, 530 So. 2d 298 (Fla. 1988).

Client Funds and Trust Accounts

Unfortunately there were numerous cases in which lawyers misappropriated or otherwise mishandled client funds.

For example, a lawyer who failed to follow simple instructions from a client, thereby causing the client to lose more than \$200,000 to a fraudulent oil venture, who converted another \$23,500 of the client's money to his own use, and who cost the client additional sums of money through his trust accounting violations was disbarred despite his protestations that a public reprimand was the appropriate discipline.⁴⁶ The lawyer introduced the client to a former client and business partner who was looking for investors for a Texas oil venture. The client instructed the lawyer to ascertain whether the businessman held a contract to buy certain leases and, if so, to invest \$234,325 of the client's funds in the venture. Without confirming the oil lease contracts, the lawyer turned over \$210,825 of the client's money to the businessman and kept \$22,500 to pay a mortgage debt owed by the lawyer's wife. The court cited the Standards for Imposing Lawyer Sanctions in explaining its choice of discipline:

Under section 4.1 of the standards for imposing lawyer sanctions, absent aggravating or mitigating circumstances, disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury. The referee found in aggravation that respondent had a prior disciplinary record, that he displayed dishonest or selfish motives, that he refused to acknowledge the wrongful nature of his conduct, that he had substantial experience in the practice of law, at the age of fifty, and that he showed indifference to making restitution.⁴⁷

A lawyer who misappropriated his client's settlement funds (\$350) and failed to communicate with the client or respond to the grievance was disbarred and required to pay restitution to the client with interest back to 1984.⁴⁸ Apparently the key to understanding such harsh discipline for such a small amount of money, compared to lesser discipline imposed in other cases when larger amounts were misappropriated, is the lawyer's failure to respond to the disciplinary proceedings.

In the case of a lawyer who managed not to harm any client while

46. *Florida Bar v. DeSerio*, 529 So. 2d 1117 (Fla. 1988).

47. *Id.* at 1120.

48. *Florida Bar v. Gillis*, 527 So. 2d 818 (Fla. 1988).

commingling his own funds with trust funds and using trust funds for his own purposes, the Florida Supreme Court rejected the bar's recommendation of a suspension with probation as well as the referee's recommendation of a private reprimand with probation.⁴⁹ A private reprimand is inappropriate, the court said, when misappropriation of client funds is involved, but in light of the referee's finding that the misconduct was not committed with wrongful intent, a suspension likewise would be inappropriate, and no purpose would be served by probation. The court imposed a public reprimand.

In a seeming inconsistency, the court imposed a one year suspension with proof of rehabilitation as a condition of reinstatement on another lawyer who made a \$20,000 loan to himself from the assets of an estate which he always intended to repay, did repay, and which apparently had no impact on timely distribution of the estate.⁵⁰ The court rejected the lawyer's argument that his use of estate funds should not be characterized as misappropriation because, as personal representative of the estate, he had authority to lend himself money. "Personal use of funds entrusted to an attorney, the beneficial ownership of which lies with another, is misappropriation even when committed with intent to repay," the court ruled, and a lawyer/personal representative is charged with the same ethical duty in dealing with estate funds as is a lawyer who receives funds in trust for a specific purpose.⁵¹ Mitigating factors in this case, which obviously had little impact, were that during the period in question the lawyer was locked in a serious battle with the Internal Revenue Service; he suffered a serious illness; he was a personal friend of the deceased; he had a long legal practice without serious disciplinary problems, and he had a long record of community service.

A lawyer who had been placed on probation for negligently commingling trust account funds with his personal funds, bouncing trust account checks, and having incomplete trust accounts records was suspended for three years when his trust account management skills

49. Florida Bar v. Lumley, 517 So. 2d 13 (Fla. 1987).

50. Florida Bar v. Greenfield, 517 So. 2d 16 (Fla. 1987).

51. FLORIDA'S RULES REGULATING TRUST ACCOUNTS Rule 5-1.1 provides that money or other property entrusted to a lawyer for a specific purpose is held in trust "and must be applied only to that purpose." The comment to Rule 4-1.15 (safekeeping property) refers to a lawyer "administering estate money and acting in similar fiduciary capacities" and notes that a lawyer acting in a fiduciary capacity may be governed by law relating to fiduciaries even though the lawyer does not render legal services in

showed a decided lack of improvement. Moreover, the suspension order provided that upon his reinstatement, the lawyer would be forbidden to have a trust account in the practice of law.⁵² The court determined that disbarment was not warranted because there was no willful misappropriation and no evidence that any client had been harmed or had complained.

Dishonesty and Similar Indicia of Unfitness

A lawyer who intentionally made false statements to the supreme court in disciplinary proceedings, who failed to produce records in response to a grievance committee subpoena, who failed to abide by a court order on disbursement of proceeds in a case the lawyer filed on behalf of a minor child, and who assisted the child's parents in violating the court order was disbarred.⁵³

A lawyer who reneged on his agreement with the client that if the court awarded a fee, part of the retainer paid by the client would be refunded and who made false statements in an effort to evade the client's claim would have been disbarred except that he had already been disbarred earlier in the year.⁵⁴

A lawyer who engaged in deceptive billing practices — showing costs lower than they actually were and fees higher than they actually were because he felt the clients would not approve a large amount of costs — was suspended for ten days. The court chose suspension rather than the private reprimand recommended by the referee because: "The falsification in any manner of bills to clients is unethical and reprehensible. Billing practices, like every other aspect of client dealing, should be conducted in a scrupulously honest manner."⁵⁵

A lawyer who requested medical records from a client's physician and who reneged on his agreement to reserve from any recovery sufficient funds to pay the physician's fees for treatment of the client was suspended for six months and thereafter until he proved his rehabilitation. A necessary element of proof of rehabilitation was to be payment to the doctor of the money owed him.⁵⁶

A thirty day suspension was imposed on a lawyer who obtained the

52. Florida Bar v. Whigham, 525 So. 2d 873 (Fla. 1988).

53. Florida Bar v. Newhouse, 520 So. 2d 25 (Fla. 1988).

54. Florida Bar v. Clark, 517 So. 2d 15 (Fla. 1987).

55. Florida Bar v. Herzog, 521 So. 2d 1118, 1120 (Fla. 1988).

56. Florida Bar v. Harris, 531 So. 2d 151 (Fla. 1988).

signature of witnesses purporting to attest to the testator's execution of a will before the execution occurred.⁵⁷ Another lawyer was reprimanded for submitting a notarized pleading to a court when he knew or should have known that the pleading contained an untrue factual averment. Further, the document was signed by the lawyer outside the presence of the notary and subsequent to the affixing of the jurat.⁵⁸

A lawyer who represented a lender in two usurious loan transactions and who placed his own pecuniary interests ahead of the interests of a second client was disbarred.⁵⁹ A lawyer who engaged in a scheme to fraudulently obtain one-hundred percent financing for a client's project by misrepresenting the purchase price of some townhouse units and who also perpetrated a fraud on a purchaser of property for the benefit of the sellers, who were his partners and clients, was suspended for ninety days.⁶⁰ Another lawyer was suspended for two years because, as counsel for a personal representative, he paid a \$10,000 finder's fee from the proceeds of the sale of estate-owned property to a person who later became his wife and who played no part in procuring the purchaser; the lawyer also denied a fee to the broker and twice notarized the signature of the personal representative out of her presence. The lawyer was also required to pay restitution and pass the ethics part of the bar examination.⁶¹

Abuse of Clients and Other People

A lawyer who abused a client in an unspecified way, sued the client for attorney's fees, and employed intimidating and frightening tactics to collect the fees was found to have engaged in conduct adversely reflecting on his fitness to practice law.⁶² The lawyer, who was already under suspension, was suspended again for an already completed ninety days. The suspension order provided that if the lawyer ever was reinstated to the practice of law he would receive one year supervisory probation if he resumed a solo practice. Another lawyer was reprimanded for his conduct in a suit he filed against a former client over ownership

57. *Florida Bar v. Story*, 529 So. 2d 1114 (Fla. 1988).

58. *Florida Bar v. Sax*, 530 So. 2d 284 (Fla. 1988).

59. *Florida Bar v. Swofford*, 527 So. 2d 812 (Fla. 1988).

60. *Florida Bar v. Nuckolls*, 521 So. 2d 1120 (Fla. 1988).

61. *Florida Bar v. Seldin*, 526 So. 2d 41 (Fla. 1988). See *Florida Bar v. Shupack*, 523 So. 2d 1139 (Fla. 1988) (ninety-one day suspension for fraudulent conduct in behalf of clients).

62. *Florida Bar v. James*, 530 So. 2d 283 (Fla. 1988).

of certain property. The lawyer misrepresented to the former client that he had mailed a letter to the state attorney asking for an investigation and criminal charges against her and that he had mailed another letter to her former husband suggesting that the man might be able to have his alimony obligations reduced.⁶³

A lawyer was suspended for six months for abusing a client who was under mental confusion and stress. The abuse included actively misrepresenting the nature and meaning of the documents he had her sign, charging her a fee so excessive as to be unconscionable, and, without full disclosure, taking from her a note and mortgage that clouded the title of her home.⁶⁴ The lawyer had been privately reprimanded twice previously for misconduct.

A lawyer who exercised virtually no control over collection of unpaid fees from clients and who conditioned his secretary's pay raises on her success in collection was reprimanded in *Florida Bar v. Gold*.⁶⁵ In *Gold* the lawyer filed a small claims action against a client for a fee balance of about \$300. The client contacted the lawyer's office to propose a payment plan, and the secretary agreed to hold the small claims action in abeyance if partial payment was made. The lawyer, reportedly ignorant of the secretary's commitment, obtained a judgment against the client and then failed to have it set aside when he did learn of the arrangement.

A lawyer who failed to make it clear to the client what representation he was willing to provide and who charged a clearly excessive fee for the representation he did provide was given a public reprimand and placed on supervised probation for two years.⁶⁶ Coercing an apparently incompetent client into executing a codicil to his will to reinstate the testator's daughter as a beneficiary, contrary to the testator's wishes, reaped a public reprimand for one lawyer despite his good intentions.⁶⁷

Failure to Supervise Nonlawyers

Lawyers obviously are responsible for supervising their nonlawyer employees, ensuring that such employees do not engage in the unautho-

63. *Florida Bar v. Rosin*, 521 So. 2d 1085 (Fla. 1988).

64. *Florida Bar v. Holland*, 520 So. 2d 283 (Fla. 1988).

65. 526 So. 2d 51 (Fla. 1988). *Florida Bar v. Fields*, 482 So. 2d 1354 (Fla. 1986) made it clear that lawyers must supervise fee collection efforts and must themselves determine in each case whether suit is warranted.

66. *Florida Bar v. Johnson*, 530 So. 2d 306 (Fla. 1988).

67. *Florida Bar v. Betts*, 530 So. 2d 928 (Fla. 1988).

rized practice of law and ensuring that the conduct of the employees is in conformance with the lawyers' own ethical obligations. In *Florida Bar v. Sheppard*,⁶⁸ the attorney received a public reprimand for misconduct that included a failure to supervise communications with clients by his secretary/paralegal, who signed letters to clients on the law office stationery without disclosing her nonlawyer status.⁶⁹ Another lawyer gave his office manager substantial authority and control over his trust account but failed to instruct her on trust account regulations, with the result that she mishandled trust funds.⁷⁰ The lawyer was reprimanded and placed on two years probation with quarterly audits of his trust account. A third lawyer was suspended for three years for misconduct that included a failure to supervise office staff, who, without his knowledge, changed the date of execution on a notarized pleading.⁷¹

The Professional Ethics Committee issued two opinions concerning nonlawyer employees. Opinion 87-11⁷² concluded that under no circumstances should a lawyer permit a nonlawyer employee to sign the lawyer's name together with the employee's initials on notices of hearing or discovery. Opinion 88-6⁷³ found it not to be impermissible per se for a lawyer to have a nonlawyer employee conduct the initial interview with a prospective client. The committee warned that it would be impermissible for the employee to answer legal questions (interpreting provisions of the fee contract, for example), that it was imperative that the lawyer closely review information taken by the nonlawyer, and that the lawyer soon establish a personal and continuing relationship with the client.

Drugs and Other Crimes

Disbarment was the Florida Supreme Court's discipline of choice

68. 529 So. 2d 1101 (Fla. 1988).

69. Professional Ethics Committee, Op. 86-4 published in THE FLORIDA BAR, PROFESSIONAL ETHICS OF THE FLORIDA BAR 1225 (2d ed., 1987), reaffirmed an earlier opinion's conclusion that a nonlawyer's title indicating nonlawyer status should appear beneath the employee's name on correspondence signed by the employee.

70. *Florida Bar v. Armas*, 518 So. 2d 919 (Fla. 1988).

71. *Florida Bar v. Robbins*, 528 So. 2d 900 (Fla. 1988). See *Florida Bar v. Gold*, 526 So. 2d 51 (Fla. 1988) (failure to supervise staff's fee-collection activity); *Florida Bar v. Hart*, 522 So. 2d 831 (Fla. 1988) (lawyer cannot abdicate to secretary duty of assuring that motion for continuance is both filed and granted).

72. Full text published in The Florida Bar News, April 15, 1988, at 15.

73. *Id.*

for lawyers convicted of felonies involving or relating to drug possession or trafficking.⁷⁴ In a case⁷⁵ not involving a felony conviction, the court was not moved by the lawyer's argument that possessing and dealing marijuana, although illegal, was not morally wrong. The court imposed more stringent discipline (disbarment) than was recommended by either the referee (one year suspension) or The Florida Bar (eighteen months). "Though not related to his law practice, Sheppard's conduct was extremely serious. Much of the resources of the judicial system are directed toward curbing the very activities upon which Sheppard was embarked," the court said. "We conclude that the appropriate discipline in this case can be nothing short of disbarment." Compare that case to *Florida Bar v. Weintraub*:⁷⁶ A lawyer for whom adjudication on a charge of delivery of a small amount of cocaine to a friend was withheld was given a ninety day suspension and two years probation. A ninety-one day suspension with the necessity of proving rehabilitation to be reinstated was deemed too severe because the lawyer was not an addict, had no prior convictions or discipline, and after his arrest took significant remedial steps to correct his behavior.

Lawyers convicted of grand theft related to their professional or other fiduciary capacity likewise tended to be disbarred.⁷⁷ The same punishment was imposed on a lawyer whom the referee found to have committed several acts constituting theft and several acts in furtherance of an attempt to defraud an insurance company.⁷⁸ In her case, the disbarment order provides that she will not have leave to reapply for twenty years.

A lawyer convicted of witness tampering and conspiracy to commit witness tampering was permitted to resign from the Bar with the right to apply for readmission if his criminal convictions should be re-

74. E.g., *Florida Bar v. James*, 519 So. 2d 614 (Fla. 1988); *Florida Bar v. Dorsey*, 520 So. 2d 269 (Fla. 1988); *Florida Bar v. Meros*, 521 So. 2d 1108 (Fla. 1988); *Florida Bar v. Nahoom*, 523 So. 2d 1137 (Fla. 1988); *Florida Bar v. Horne*, 527 So. 2d 816 (Fla. 1988). FLORIDA STANDARD FOR IMPOSING LAWYER SANCTIONS 5.11 provides that disbarment is appropriate when a lawyer is convicted of a felony or engages in the sale, distribution or importation of controlled substances.

75. *Florida Bar v. Sheppard*, 518 So. 2d 250 (Fla. 1987).

76. 528 So. 2d 367.

77. E.g., *Florida Bar v. Padgett*, 529 So. 2d 1099 (Fla. 1988); *Florida Bar v. Bernstein*, 529 So. 2d 1108 (Fla. 1988); *Florida Bar v. Bussey*, 529 So. 2d 1112 (Fla. 1988); *Florida Bar v. Lowe*, 530 So. 2d 58 (Fla. 1988).

78. *Florida Bar v. Simons*, 521 So. 2d 1089 (Fla. 1988).

versed.⁷⁹ Two lawyers who were involved in the Hillsborough County Commission bribery scandal were disbarred.⁸⁰ In one of the latter decisions, *Florida Bar v. Rambo*, the court quoted a 1972 discipline case for the proposition that "bribery is a particularly noxious ethical failure . . . [that] strikes at the very heart of the attorney's responsibility to the public and profession."⁸¹

A lawyer who, as personal representative of an estate, knowingly and successfully filed forged and false affidavits inventing a sole surviving heir to a woman who died intestate and without heirs and then took possession of the assets, converting them to his own use, was disbarred in *Florida Bar v. Roman*.⁸² The referee recommended a three year suspension because of mitigating factors, which included the lack of prior discipline, the nine months the lawyer was required to spend in jail for grand theft, the lawyer having made restitution, and the lawyer having been in therapy for acute stress in his personal life. The court agreed with the bar that regardless of the mitigating factors, the conduct warranted disbarment: "This case involves not only theft, but fraud on the court which strikes at the very heart of a lawyer's ethical responsibility."

A lawyer who advised and represented a client on ostensibly legitimate business affairs that the lawyer knew were affected by or connected with possible criminal activities on the part of the client was given a public reprimand.⁸³

Other Misconduct Unrelated to Practice of Law

A lawyer who owned a car leasing agency and failed to deliver title to one customer's car for eleven months after the car was paid for, when state law requires delivery of title within twenty days, was reprimanded.⁸⁴ The court rejected the lawyer's argument that he should not be disciplined for improper conduct unrelated to the practice of law, responding that "lawyers are necessarily held to a higher standard of conduct in business dealings than are nonlawyers. Were we to follow [the lawyer's] argument, we would be powerless to discipline attorneys

79. *Florida Bar v. Meyer*, 529 So. 2d 1098 (Fla. 1988).

80. *Florida Bar v. Sierra*, 521 So. 2d 1111 (Fla. 1988); *Florida Bar v. Rambo*, 530 So. 2d 926 (Fla. 1988).

81. *Rambo*, 530 So. 2d at 928.

82. 526 So. 2d 60 (Fla. 1988).

83. *Florida Bar v. Levey*, 525 So. 2d 420 (Fla. 1988).

84. *Florida Bar v. Hosner*, 520 So. 2d 567 (Fla. 1988).

who engage in conduct that is illegal, but not related to the practice of law, such as dealing in cocaine, or securities fraud."⁸⁵

Substance Abuse

A lawyer who turned himself in to the Bar after his alcoholism led to his taking "gifts" amounting to \$19,000 from an elderly client was suspended for eighteen months for improper use of client funds and trust account violations.⁸⁶ For the term of his suspension the lawyer also was placed on probation, with the condition that he complete a program of recovery and rehabilitation from alcoholism. Another lawyer who committed a host of ethical violations (neglect, conversion of client funds, bad checks, misrepresentation, and more) was found to have abandoned his practice because of a chemical dependency.⁸⁷ His belated attempt to establish that he had begun to rehabilitate himself was insufficient to mitigate discipline, and he was disbarred. A third lawyer who appeared before a judge on two occasions while under the influence of alcohol was given a public reprimand, placed on two years probation, required to submit to evaluation by Florida Lawyers Assistance, and required to undergo a rehabilitation program if so recommended.⁸⁸ A fourth lawyer who was twice convicted of driving under the influence and who was jailed for violating probation and again for contempt of court for arriving late to court under the influence was reprimanded and given three years probation. He also was required to be evaluated by Florida Lawyers Assistance and to abide by its recommendations.⁸⁹

A contract attorney for the Department of Health and Rehabilitative Services (HRS) was found guilty of numerous counts of failing to deposit client funds into his trust account: failing to place putative fathers' advances for blood tests into escrow or to disburse them to pay

85. *Id.* at 568 (citation omitted). FLORIDA'S RULES OF DISCIPLINE Rule 3-3.4 provides: "The commission by a lawyer of any act which is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise . . . may constitute a cause for discipline."

86. Florida Bar v. Marshall, 531 So. 2d 336 (Fla. 1988).

87. Florida Bar v. Hardman, 516 So. 2d 262 (Fla. 1987).

88. Florida Bar v. Davis, 523 So. 2d 568 (Fla. 1988).

89. Florida Bar v. Allen, 518 So. 2d 916 (Fla. 1988). In Florida Bar v. Bodiford, 518 So. 2d 265 (Fla. 1988) another lawyer with substance abuse and trust account problems was suspended for ninety days and placed on three years probation that included a drug rehabilitation program and monitoring by Florida Lawyers Assistance.

for the tests or to forward them to HRS, forwarding to successor counsel only a fraction of the funds he had collected on behalf of the clients of HRS, failing to disburse funds due to a client, failing to use funds received from a client for the purposes specified by the client, and arranging for one client to make another client a loan at a rate of interest of 80% without advising either client that the interest rate was usurious, felonious, and unenforceable.⁹⁰ The lawyer was suspended for two years with two years supervised probation and participation in the Florida Lawyers Assistance rehabilitation program. The reason for the seemingly mild discipline (two justices considered it too lenient) was that the court found the lawyer's violations were unintentional and occurred during an eighteen month period of marital difficulties and were due in part to drug and alcohol addiction. The court found that the lawyer had made steady progress toward rehabilitation and that no other complaints had been filed against the lawyer before or since the period in question.

Withdrawal and Substitution of Counsel

Rule 4-1.16(c) provides that a lawyer may not withdraw from a matter in litigation even for good cause if the court orders the lawyer to continue. The Florida Supreme Court recently made two changes in Rule of Judicial Administration 2.060 relating to withdrawal and substitution of counsel.⁹¹ An addition to Rule 2.060(i) transformed a provision *permitting* an attorney who seeks to withdraw from an action to file a motion stating the reasons for withdrawal into a provision *requiring* the filing of a motion stating the reasons. The amendment also adds a requirement that the motion be set for hearing, with notice served on the client and the adverse party. An amendment to Rule 2.060(h) adds a requirement that before a substitution of counsel is permitted, the client must be notified in advance and must consent in a writing filed with the court.

While these rule changes were made easily enough, the Florida Bar's Perjured Testimony Committee has had some difficulty resolving the question of whether, and how, Rule 4-3.3 (candor toward the tribunal) should be amended to provide clear guidance to criminal defense attorneys who believe their clients will commit perjury if permitted to

90. Florida Bar v. Hartman, 519 So. 2d 606 (Fla. 1988).

91. Florida Bar in re Rules of Judicial Administration, 532 So. 2d 667 (Fla. 1988).

testify and whose motion to withdraw based on that belief is denied. A sticking point has been whether use of narrative testimony should be expressly condoned or condemned by the rule or comment.⁹² This project grew out of Ellis Rubin's contempt of court proceedings arising from his refusal to continue representation of a criminal defendant when his motion to withdraw was denied.⁹³

A discussion of the subject of withdrawing from representation often turns to the subject of unpaid fees and unreimbursed costs. A recent opinion of the Professional Ethics Committee discusses the ethical propriety of asserting a retaining lien against a client's file, funds, or other property.⁹⁴ Another recent opinion of the committee discusses the oft-stated proposition that a lawyer should sue a client for a fee only as a last resort.⁹⁵

Frivolous Litigation and Noncompliance with Appellate Rules

Federal Rule of Civil Procedure 11, which provides for the imposition of sanctions against attorneys and parties who press frivolous claims and defenses and engage in abusive tactics, has received considerable attention in law reviews and bar journals in the last few years.⁹⁶ Florida courts have had their own Rule 11 in the form of Florida Statutes, section 57.105,⁹⁷ and Florida Rule of Appellate Procedure

92. See Messing, *Representing the Criminal Defendant Who Intends To Lie*, 52 FLA. B.J., 26 (Apr. 1987); Braccialarghe, *Client Perjury: The Law in Florida*, 12 NOVA L. REV. 707 (1988).

93. Sanborn v. State, 474 So. 2d 309 (Fla. 3d Dist. Ct. App. 1985); Rubin v. State, 490 So. 2d 1001 (Fla. 3d Dist. Ct. App.), *rev. denied*, 501 So. 2d 1283 (Fla. 1986), *cert. denied*, 107 S. Ct. 3228 (1987).

94. Op. 87-11. Full text published in The Florida Bar News, Aug. 1, 1988, at 11. The Florida courts also have had occasion recently to address issues involving retaining liens and charging liens. *E.g.*, Riesgo v. Weinstein, 523 So. 2d 752 (Fla. 2d Dist. Ct. App. 1988) (retaining lien against case file); Hutchins v. Hutchins, 522 So. 2d 547 (Fla. 4th Dist. Ct. App. 1988) (charging lien).

95. Op. 88-1. Full text published in The Florida Bar News, July 15, 1988, at 20.

96. *E.g.*, Sutton & Luck, *Federal Rule 11: Basic Guidelines for Avoiding Sanctions*, 52 FLA. B.J. 31 (Nov. 1987); Note, *The Intended Application of Federal Rule of Civil Procedure 11: An End to the "Empty Head, Pure Heart" Defense and Reinforcement of Ethical Standards*, 41 VAND. L. REV. 343 (1988); Note, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901 (1988).

97. FLA. STAT. § 57.105 (Supp. 1988) states:

The court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney in any civil action in which the court finds that there was a complete

9.410,⁹⁸ and they have not neglected to use these tools.⁹⁹ The courts' use of this sanction power reinforces the rules of ethics that proscribe the same conduct.¹⁰⁰ While the Florida Supreme Court has sole juris-

absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party; provided, however, that the losing party's attorney is not personally responsible if he has acted in good faith, based on the representation of his client.

In its original form the statute did not target lawyers personally:

The court shall award a reasonable attorney's fee to the prevailing party in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party.

FLA. STAT. § 57.105 (1985). The statute was amended in 1986.

98. FLA. R. APP. P. 9.410 states: "After 10 days notice from the court, the following may be imposed for violation of these rules: reprimand, contempt, striking of briefs or pleadings, dismissal of proceedings, costs, attorney's fees or other sanctions."

99. Sanctions were imposed against lawyers in *Ginder v. Ginder*, 531 So. 2d 226 (Fla. 1st Dist. Ct. App. 1988); *McClain v. Florida Power & Light Co.*, 523 So. 2d 1245 (Fla. 1st Dist. Ct. App. 1988); *Howard v. Baumer*, 519 So. 2d 679 (Fla. 1st Dist. Ct. App. 1988); *City of Jacksonville v. Ortega Util. Co.*, 531 So. 2d 370 (Fla. 1st Dist. Ct. App. 1988); *Dowell v. Sunmark Indus.*, 521 So. 2d 377 (Fla. 2d Dist. Ct. App. 1988); *Moose v. State*, 519 So. 2d 61 (Fla. 2d Dist. Ct. App. 1988); *Lage v. Blanco*, 521 So. 2d 299 (Fla. 3d Dist. Ct. App. 1988). See *Webster v. Commonwealth Mortgage Corp. of America*, 516 So. 2d 103 (Fla. 4th Dist. Ct. App. 1987) (directing that fees be imposed under FLA. STAT. § 57.105 for the appeal if the trial court should determine that appellant or his counsel unreasonably refused an unconditional offer to permit the default appealed from to be vacated).

100. See Allen, *Ethics in the 1990's*, in EMPLOYMENT LAW ISSUES FOR THE 1990's SEMINAR (Fla. Bar. 1989); *Florida Bar v. Weed*, 518 So. 2d 126 (Fla. 1987). It is not uncommon for the courts, in imposing sanctions, to direct that a copy of the order be supplied to the appropriate Florida Bar grievance committee for consideration. E.g., *Ginder v. Ginder*, 531 So. 2d 226 (Fla. 1st Dist. Ct. App. 1988); *McClain v. Florida Power & Light Co.*, 523 So. 2d 1245 (Fla. 1st Dist. Ct. App. 1988); *Moose v. State*, 519 So. 2d 61 (Fla. 2d Dist. Ct. App. 1988). Compare the conduct sanctioned in these cases and the others listed in *supra* note 98 to the conduct resulting in professional discipline in *Florida Bar v. Anderson*, 515 So. 2d 224 (Fla. 1987) (frivolous defenses); *Florida Bar v. Golden*, 530 So. 2d 931 (Fla. 1988) (failure to file timely appellate brief despite two extensions).

FLORIDA'S RULES OF PROFESSIONAL CONDUCT Rule 4-1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

FLORIDA'S RULES OF PROFESSIONAL CONDUCT Rule 4-3.1 provides in pertinent part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for extension, modification or reversal of existing law."

FLORIDA'S RULES OF PROFESSIONAL CONDUCT Rule 4-3.2 provides: "A lawyer

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diction to discipline members of the bar, all Florida courts have powers to control lawyers who become contemptuous or recalcitrant. The fact that the same conduct might result in bar discipline does not involve the principles of double jeopardy or res judicata.¹⁰¹

A discussion of frivolous litigation and sanctions should not omit *Florida Bar v. Clark*.¹⁰² the court imposed a public reprimand on a lawyer who so piqued the ire of former United States Chief Justice Warren Burger because of the lawyer's extensive and "utterly frivolous" litigation arising out of a speeding ticket he received while a law student. He appealed the Fifth District Court of Appeal's order awarding the state a \$100 attorney's fee under Florida Statutes, section 57.105, to the United States Supreme Court.¹⁰³ The public reprimand also decried the lawyer's allegations and litigation which falsely charged the judges of the Court of Appeals for the Eleventh Circuit with corruption and racketeering.

Improper Courtroom Tactics

Rule 4-3.4(c) imposes on trial lawyers an obligation not to

allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused."

There recently have been numerous instances of improper closing arguments in both civil and criminal cases, some resulting in new trials,¹⁰⁴

shall make reasonable efforts to expedite litigation consistent with the interests of the client."

FLORIDA'S RULES OF PROFESSIONAL CONDUCT Rule 4-3.4 provides, *inter alia*, that a lawyer shall not "[k]nowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."

FLORIDA'S RULES OF PROFESSIONAL CONDUCT Rule 4-8.4 provides in part that a lawyer shall not "[e]ngage in conduct that is prejudicial to the administration of justice."

101. *Florida Bar v. Weed*, 513 So. 2d 126 (Fla. 1987).

102. 528 So. 2d 369 (Fla. 1988).

103. *Clark v. Florida*, 475 U.S. 1134 (1986), *appeal dismissed*, 57 U.S.L.W. 3443 (1989).

104. *Redish v. State*, 525 So. 2d 928 (Fla. 1st Dist. Ct. App. 1988) (telling ju-

some not,¹⁰⁵ and at least one resulting in an appellate court order reversing a conviction obtained by the state in the retrial and ordering that the defendant be discharged.¹⁰⁶

Disciplinary Procedures

*Florida Bar v. Bergman*¹⁰⁷ makes clear that the bar is not required to expend extensive effort on finding and serving notice on a lawyer against whom disciplinary proceedings have been instituted. A lawyer who changes his record bar address without notifying the bar, as required by Rule 1-3.3, Rules Regulating The Florida Bar, risks being disciplined in absentia. Bergman was suspended for six months in 1986. He later filed a motion for rehearing, claiming lack of proper notice. On remand the referee found that the bar did attempt proper notice and service to the lawyer's record bar address and that when the bar learned that Bergman was not at his record bar address, it tried to locate him, but failed. The court rejected the lawyer's contention that the bar should have conducted a more thorough investigation to find him and reaffirmed the suspension order.

One lawyer fighting disbarment unsuccessfully argued that the disciplinary proceeding should have been stayed until expiration of the two year period for filing collateral attacks on his 1986 felony conviction for threatening to kill the governor and that his conviction was void because he was charged by information rather than by indictment.

rors they would be violating their oath if they accepted the defense's arguments and making a personal attack on defense counsel); *Stokes v. Wet 'N Wild*, 523 So. 2d 181 (Fla. 5th Dist. Ct. App. 1988) (defense counsel's closing argument describing plaintiff's claim as an example of why courtrooms are crowded and expressing his personal opinion about the credibility of witnesses).

105. *Hippensteel v. State*, 525 So. 2d 1027 (Fla. 5th Dist. Ct. App. 1988) (calling defendants "punks" and then sarcastically referring to them as fine and upstanding); *Puza v. Winn-Dixie Supermarkets, Inc.*, 526 So. 2d 696 (Fla. 4th Dist. Ct. App. 1988) (plaintiff's counsel asked fifteen leading questions that were objected to); *Jeep Corp. v. Walker*, 528 So. 2d 1203 (Fla. 4th Dist. Ct. App. 1988) (misconduct on both sides, which caused court to comment on "regrettable general decline in courtroom deportment nowadays").

106. *Duncan v. State*, 525 So. 2d 938 (Fla. 3d Dist. Ct. App. 1988) (prosecutor deliberately goaded defendant into moving for mistrial by twirling toy gun on his finger during defense counsel's concluding argument, and in new trial before different judge, prosecutor was allowed to place in evidence real gun that had been excluded at first trial).

107. 517 So. 11 (Fla. 1987).

ment.¹⁰⁸ In response to the first argument, the court stated that expiration of the period for collateral attacks does not establish the finality of a conviction, that the lack of finality of a conviction does not necessarily preclude disbarment, and that the lawyer in fact did not file an appeal. The court found it unnecessary to address the voidness argument because Rule of Discipline 3-7.2(b) provides that judgments of guilt are conclusive proof of guilt of the criminal offenses charged.

In *Florida Bar v. Collier*, the Florida Supreme Court applied the principles of res judicata and law of the case in a discipline proceeding. The court refused to review the finding of guilt made in the lawyer's original suspension hearing. "The matter is closed," the court said. "The principles of res judicata and the law of the case clearly prohibit Mr. Collier from relitigating the issue of his guilt."¹⁰⁹

A lawyer who made the mistake of not opening his discipline-related mail from the Bar and who as a result failed to comply with a temporary suspension and an order to show cause why he should not be held in contempt was disbarred by the supreme court.¹¹⁰ The bar had been attempting to investigate complaints regarding neglect and trust account violations. The referee recommended a two-year suspension, which the court rejected:

Aside from direct contempt of this Court by continuing to practice law while still suspended, respondent has effectively thwarted the efforts of the Bar since 1986 to investigate the complaints against him. We cannot countenance such behavior and reject the proposition that disciplinary proceedings and orders of this Court can be ignored by consciously deciding not to open mail. To accept such a proposition as mitigation would require that the Bar and this Court take physical custody of respondents in order to ensure notification of disciplinary actions or proceedings has been accomplished.¹¹¹

108. *Florida Bar v. MacGuire*, 529 So. 2d 669 (Fla. 1988).

109. 526 So. 2d 916 (Fla. 1988).

110. *Florida Bar v. Santiago*, 521 So. 2d 1111 (Fla. 1988).

111. *Id.* at 1112.